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Supreme Court, U.S.
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Case No. 10-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2010

EUGENE H. MATHISON,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Pursuant to Supreme Court Rule 10(a), should this Court exercise its supervisory powers to resolve a split among the circuits as to whether Fed.R.Civ.P. 60(b)(4) has a time limit, when several circuits, including the Eighth Circuit hold that such a motion must be made within a "reasonable time," whereas most circuits say there is no time limit?

2. Pursuant to the same Rule, ought the Court to clarify what the oft-quoted grounds for relief via a void judgment motion in addition to jurisdictional failures, "where the court acted in a manner inconsistent with due process," means; some circuits appear to consider only failures of proper service to be implicated?

3. Could a judgment ever be deemed valid when it was based upon pleadings in another and unrelated case and no consideration was made due to that mix up of the actual pleadings?

4. Is there room for this Court to validate its opinion in *Klapprott v United States*, 335 U.S. 601, 614-615 (1949) that the lower courts have "authority to enable them to vacate judgments *whenever* such action is appropriate to accomplish justice"?

5. Could a judgment ever be valid if it was mistakenly based exclusively upon pleading in an entirely different and unrelated case, upon the response of a different Asst. U.S. attorney addressing different issues and supporting law; findings in 00-cv-4055 based upon 99-cv-4208?

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Appendix Pages "D-1" through "D-11" is a copy of the magistrate's Findings and Recommendations in Case No. 00-cv-4055.

Appendix Pages "E-1" through "E-5" is a copy of a list

of some of the examples of newly discovered facts set forth in the pleadings in Case No. 00-cv-4055 which were never mentioned.

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OPINIONS BELOW

On November 30, 2010, the Eighth Circuit entered its judgment denying Petitioner's Rule 60(b)(4) Motion.(Appendix Page "A-l")

On June 16, 2010, the District Court of South Dakota. Hon. Richard H. Battey presiding, denied Petitioner's Rule 60(b)(4) Motion on grounds that "a Rule 60(b)(4) motion must be made within a reasonable time," and that "there is nothing in the record before the Court that suggests this 'new' evidence would likely result in a different outcome." (Note: The "new" evidence referred to wasn't raised in the Rule 60(b)(4) Motion for the first time; it was raised in Petitioner' § 2255 pleadings and never decided on its merits.) (Appendix Pages "B-l" through "B-7" hereto.)

On August 6, 2010, Judge Battey denied Petitioner's Rule 59(e) Motion and his Motion to proceed on appeal in forma pauperis. (Appendix Pages "C-l" through "C-3" hereto.)

JURISDICTION

The date the judgment sought to be reviewed was entered was on November 30, 2010. The Eighth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.The notice of appeal was timely filed.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 and this Petition is filed well within the 90-

day period allowed pursuant to Supreme Court Rule 13(1).

The district court had jurisdiction pursuant to 28 U.S.C. § 2255 because the judgment challenged in Petitioner's Rule 60(b)(4) Motion was the denial of his § 2255 Motion. Rule 60 Motions cannot provide jurisdiction independent of the jurisdiction underlying the judgment being collaterally challenged.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment:

"No person shall be held to answer ... nor be deprived of life, liberty, or property, without due process of law." (The Court has held that the Fourteenth Amendment's Section 1 provision adding: "nor deny to any person within its jurisdiction the equal protection of the laws," to govern interpretation of the Fifth Amendment's Due Process Clause.)

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy ... [and] to have the Assistance of Counsel for his defence."

Section 2255 of title 28:

"(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto....

"(f) A 1-year period of limitation shall apply to a motion under this section. The limitation shall run from the latest of — ... (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

Fed.R.Civ.P. 60(b)(4):

"(b) Grounds for Relief from a Final Judgment, Order, of Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) the judgment is void."

STATEMENT OF THE CASE

Petitioner was indicted on June 5, 1996, for allegedly operating a Ponzi scheme in violation of 18 U.S.C. §§ 1341 and 1343. Money laundering pursuant to 18 U.S.C. § 1956 was charged in order to enhance the sentence from the statutory limitation of five years to 20 years.

On October 2, 1996, additional charges were

brought and three friends of Petitioner were added in a Superseding indictment. When Petitioner refused to lie and say he was guilty when he was not, and when he refused to lie in order to assist the Government to convict three men whom he knew positively were innocent, the Government added a second, indictment for allegedly evading the payment of some of the withholding taxes from his business. (The prosecution stipulated during trial that all of the Form 941s were filed timely and accurately.)

Petitioner was tried on the tax charge in a three-day trial beginning February 18, 1997. He was convicted due to the woefully ineffective assistance of counsel he had retained. (Petitioner notified the judge during the trial that he was terminating counsel when he learned that counsel had failed to subpoena two witnesses he earlier agreed were vital to the defense and that they were not present; the judge ignored him and after the jury was informed that the evidence and testimony were complete and they'd only have closing arguments and instructions, he brought Petitioner and counsel into chambers and said that he didn't have to allow termination of appointed counsel. When informed that counsel was retained, the judge said that he was wrong, that Petitioner had the absolute constitutional right to do so, but he didn't recommend it. The next morning the judge said that he was probably setting himself up for reversal on appeal but he was going to deny the request to fire counsel.) Due to continued incompetence and inadequate and ineffective rep-

resentation, Petitioner was convicted.

During March 1997, Petitioner's request to allow counsel to withdraw was heard, along with Petitioner's request to be allowed to view evidence seized was heard by the magistrate. Counsel was allowed to withdraw, but the magistrate's earlier warning that he would not allow a continuation to bring a new attorney up to speed prevented Petitioner from obtaining competent assistance. He felt he had to proceed pro se, which he did during a three-week trial, though he was obviously incapable of matching wits with the two Government prosecutors. He and his co-defendants were convicted.

On July 10, 1997, Petitioner was sentenced in the tax case to 21 months. On July 18, he began serving his sentence. On September 13, 1997, he was brought back to court and sentenced to 246 months.

During sentencing the court imposed the sentences and then informed the three co-defendants that their appointed counsel would represent them on appeal; however, he failed to even mention that Petitioner had the right to proceed in forma pauperis with appointment of counsel on direct appeal. Petitioner presumed that because he had earlier waived his right to counsel on trial and sentencing, he had waived it for all other purposes. Hence, he had to ask his financially impoverished wife and four children to help him. They used their grocery money to pay the appeal fee but could not cover the thou-

sands of dollars needed for the transcript.

Petitioner's son, Derrod Mathison, typed the appeal brief Petitioner had written out; he had to redo it because it was too long, and eventually the brief was filed. Due to his inability and lack of knowledge of the law, Petitioner failed to properly support and raise the issues which would have been successful had they been properly briefed. The appeal affirmed the conviction and the unconscionable 246-month sentence.

After the Eighth Circuit affirmed the conviction and sentence in the tax case, and while waiting for their decision in the Ponzi case, Petitioner began researching and preparing a § 2255 in the tax case, as his ineffective assistance issues were urged by the court to be brought in a § 2255.

During the early stages of this effort, Petitioner received the decision of the Eighth Circuit in the Ponzi appeal and he prepared a Petition for Rehearing there. When that was denied, he had to prepare a Petition for Writ of Certiorari with this Court, which was denied on January 11, 1999.

Back on the project of preparing the § 2255 in the tax case, Petitioner finally completed that and filed it in November, 1999 (Case No. 99-CV-4208)(D.S.D.). Upon completing that motion, Petitioner went about researching and preparing his § 2255 in the Ponzi case. By that time Petitioner had learned that he had a right to counsel and to proceed in forma

pauperis on direct appeal, but had not been informed. This opened up the way for him to raise issues in the § 2255 which would normally be raised in direct appeal.

On December 4, 1999, Petitioner was called to R & D and told to pack out and that he could not take his legal papers with him to finish his § 2255, though the deadline was just a few weeks away. On December 9, 1999, Petitioner arrived at the South Dakota Penitentiary, where the U.S.M.S. had a contract to hold Federal detainees. Every day through the end of his stay there on December 30, he asked for access to the law library or assistance from someone trained in the law to assist him. He filed three requests with the sentencing court for access to law books and his legal papers so he could complete his § 2255 which was due imminently. On January 5, 2000, the Hon. Lawrence L. Piersol, sentencing judge, instructed the U.S.M.S. to transfer Petitioner to a CCA facility in Appleton, Minnesota so he'd have access to law books. He also instructed the clerk to provide copies of the transcript to assist Petitioner, which arrived near the first of February, 2000—why would he have done that unless he understood that the circumstances warranted at least equitable tolling, or an extension of the limitation pursuant to § 2255(f)(2)?

Petitioner requested and received the remainder of his legal papers at the CCA in early February, 2000, but the limitation under § 2255(f)(1) had already passed. The added problem of the refusal of

the CCA authorities to provide for more than 90 to 120 minutes a week in the law library left Petitioner the need to try to copy caselaw which he found during those two short time periods in the library and write up a draft of the motion for his son to type and send back drafts of for editing. Due to this unconstitutional interference with Petitioner's right of access to the courts, he was unable to file his § 2255 in the Ponzi case until 11 weeks late.

The motion was filed with the sentencing court but Judge Piersol transferred the proceedings to Judge Richard H. Battey and he, in turn, assigned the case to Magistrate Marshall P. Young. Magistrate Young got mixed up and eventually made his findings based exclusively upon AUSA David Zuercher's Response to an unauthorized Second Addendum filed months later and raising an *Apprendi* issue and upon AUSA Mara Kohn's Response to Petitioner's § 2255 *in the tax case*! No reference was made to any of nearly two dozen examples of new evidence, some of which weren't even obtained by the Government until a month after the trial when a search was made of the man's office to whom he had lent more than a million dollars of his and his partners' money; some was evidence which the magistrate had refused to provide before trial and that which was seized from Petitioner's home and office after the initial seizure and while Petitioner was jailed. Some was in the form of affidavits from parties whom Judge Piersol had refused Petitioner the right to communicate and which were finally persuaded by Petitioner's son,

Derrod, to come forward with their statements.

Because the § 2255 in the tax case did not raise any new evidence at all, and because AUSA Zuercher's Response to the *Apprendi* issue, and because the magistrate never even appears to have looked at the actual motion in the Ponzi case, he determined that the motion was time barred. Though Petitioner objected to the judge that the findings weren't even based on the proper pleadings, the judge denied the motion (Case No. 00-cv-4055)(D.S.D.). Neither Judge Battey, nor the Eighth Circuit, nor this Court granted a COA.

When this Court decided *Gonzalez v Crosby*, Petitioner filed a Rule 60(b)(6) Motion with the district court, challenging only the integrity of the proceeding which erroneously decided the motion was time barred. Judge Battey denied it and Petitioner was unable to obtain and COA from any court or judge.

Further research made Petitioner aware that Rule 60(b)(4) was generally held to be raised at any time; Judge Battey denied the Rule 60(b)(6) Motion because he said it was not filed within a reasonable time. Petitioner provided absolute proof that the court denied him procedural due process when it never even determined the issues, did not find the *actual* facts, and made no conclusions of law as to the newly discovered evidence—which Magistrate Young admitted would have extended the time for filing. (He used AUSA Kohn's Response in Case No.

99-CV-4208 to determine that the issues raised did not constitute newly discovered facts in Case No. 00-cv-4055.)

Petitioner filed a Rule 59(e) Motion with Judge Battey to call attention to the error he made in denying the Rule 60(b)(4) Motion because he didn't believe the underlying § 2255 in 00-cv-4055 had any merit; further that it was not brought within a reasonable time. This petition follows.

REASONS FOR GRANTING THE WRIT

A. The Court ought to use its supervisory powers to resolve the conflict between the circuits as to whether a Rule 60(b)(4) motion is subject to the "reasonable time" limitation which applies to some 60(b) motions or may be brought at any time.

The circuits which apply a "reasonable time" limit include:

In *Western Shoshone National Council, et al., v United States*, 279 Fed. Appx. 980, 985 (Fed.Cir. 2008), that court said that "[t]he predecessor to RCFC 60(b), Ct. C1. Rule 152(b) 'commands that the motion shall be made within a "reasonable time."' *Id.* (citing *Andrade v United States*, 485 F.2d 660, 664 (Ct. C1. 1973).)

In *Parviz Karim-Panahi v Washington Metropolitan Area Transit Authority, et al.*, 2008 U.S. App. LEXIS 26305 (D.C.Cir. 2008), that court said that an 18-month delay in filing "was not ... 'within reasonable time.'"

In *Days Inns Worldwide, Inc. v Patel*, 445 F.3d 899, 901 (6th Cir. 2006), that court said that the district court's denial of a motion under Fed.R.Civ.P. 60(b)(4) was affirmed because "the motion was not filed within a 'reasonable time' as required by Fed.R.Civ.P. 60(b)(4). (But see *Taubmen Company v Webfeats*, 319 F.3d 770, (6th Cir.2003) where that court said that subject matter jurisdiction can be

raised at any time ... [although not] a challenge to personal jurisdiction.")

In *Baldwin v Credit Based Asset Servicing and Securitization*, 516 F.3d 734, 737 (8th Cir. 2008), that court said that a Rule 60(b)(4) motion must be made within a reasonable time." (But see *Kansas City Southern Railway Company v Great Lakes Carbon Corporation*, 1979 U.S. App. LEXIS 11659 (8th Cir. 1979), that court said that Rule 60(b)(4) motions have no time limit.)

Circuits which hold that there is no time limit include:

In *Farm Credit Bank of Baltimore v Ferrera-Goitia et al.*, 316 F.3d 62, 67 (1st Cir. 2003), that court said that "[s]ince a void judgment is a legal nullity, there is ordinarily no need to request relief from it (and thus no time limit within which to request relief) (But see: *Limerick, et al. v Greenwald, et al.*, 749 F.2d 97, 99 (1st Cir. 1984) ("Under rule 60(b)(4), (5) or (6) the motion must be made within a reasonable time.")

In *"R" Best Produce, Inc., v Disapio, Sr., et al.*, 540 F.3d 115, 123-124 (2nd Cir. 2008), that court said:

> "Although Rule 60(b) (provides that most motions for relief, including a motion under Rule 60(b)(4), must be made 'within a reasonable time,' ... this Court has been exceedingly lenient in defin-

ing the term reasonable time,' with respect to voidness challenges. In fact, it has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void 'may be made at any time.' *Beller & Keller v Tylor*, 120 F.3d 21, 24 (2nd Cir. 1997) (quoting 12 James Wm. Moore, et al. Moore's Federal Practice and Procedure 60.44[5][c])."

The court went on to give examples where motions were granted as much as 30 years & after the judgment attacked.

In *United States v One Toshiba Color Television, et al.*, 213 F.3d 147, 157 (3rd Cir. 2000), said that:

"... no passage of time can transmute a nullity into a binding judgment, and hence there is no time part limit for such a motion. It is true that the text of the rule dictates that the motion will be made within 'a reasonable time.' See Fed.R.Civ.P. 60(b). However, nearly overwhelming authority exists for the proposition that there are no time limits with regards to a challenge to a void judgment because of its status as a nullity."

In *Jackson v United States*, 245 Fed. Appx. 258, 261 (4th Cir. 2007), that court said that: "Jackson's Rule 60(b)(4) motion challenging the district court's June 4, 1997, dismissal order was not untimely. Motions attacking a judgment as void under Rule 60(b)(4) have no time limit.... Thus the district court order dismissing Jackson's § 2255 motion was void."

In *Jackson, et al. v Tanfoglio, et al.*, 302 F.3d 515, 523 (5th Cir. 2002), that court held that "the mere passage of time cannot convert an absolutely void judgment into a valid one. This is one reason for our having said that there is no time limit on Rule 60(b)(4) motions."

In *Homer v Jones-Beh*, 415 F.3d 748, 752 (7th Cir. 2005), that court said that "[u]nder Federal Rule of Civil procedure 60(b)(4), a movant 'may attack the judgment for lack of jurisdiction over the person at any time since a judgment rendered without jurisdiction over the person is void.' *Robinson Engineering Co. Pension Plan and Trust v George*, 223 F.3d 445, 453 (7th Cir. 2000)." (*See also In re Factor VIII or IX Concentrate Blood Products Litigation*, 159 F.3d 1016 (7th Cir. 1998) ("Fed R. Civ. P. 60(b)(4) authorizes, and the cases interpreting it require, 'void' judgments to be set aside at any time.")

In *In re Phenylpropanolamine (PPA)*, 318 Fed. Appx. 451, 453 (9th Cir. 2008), that court noted that the "district court held that the ... Plaintiffs' two-year delay before filing a motion for relief was unreasonable and denied the motion as untimely." But, the court disagreed, saying that "if a judgment is void, a motion to set it aside may be brought at any time."

In *Sindar v Garden, et al.*, 284 Fed. Appx. 591, 593 (10th Cir. 2008), that court said that:

"[a] district court must grant relief under Rule 60(b)(4) if 'the judgment is void.' Fed.R.Civ.P. 60(b)(4); *see V.T.A., Inc., v Airco, Inc.*, 597 F.2d 220, 224 n. 8 (10th Cir. 1979") ('If voidness is found, relief is not discretionary, it is mandatory.') Unlike the other provisions of Rule 60(b), Rule 60(b)(4) is not limited by the timeliness provisions of Rule 60(c)."

In *Smith v United States*, 2010 U.S. App. LEXIS 14050 (11th Cir. 2010), that court said that because "the First, Fifth, Seventh, Tenth and D.C. Circuits have expressly held that a Rule 60(b)(4) motion is not subject to any time restriction, and further noting that this circuit "'has indicated acceptance of this position,'" they deem time for filing a Rule 60(b)(4) motion proper at any time.

This Court does not appear to have decided this question. The closest it came to such a conclusion that time limits didn't apply that Petitioner has been able to find was in *Klapprott v United States*, 335 U.S. 601, 609 (1949) where the Court noted that Rule 60(b) authorizes a court to set aside 'a void judgment' without regard to the limitation of a year applicable to set aside on some other grounds."

In the Commentary by Linda G. Birchall and Bradley W. Grout, Powell, Goldstein, Frazer & Murphy LLP, the National Institute for Trial Advocacy, Notre Dame Law School, following the text of Rule 60, they state:

"The fourth ground [Rule 60(b)(4)] provides for

relief from judgments that are void. There is no time limit for motions for relief from void judgments. A void judgment is always void, regardless of any other factors or circumstances. There is no need to establish a meritorious defense or other equitable reason for relief. The most common ground is lack of jurisdiction, whether over the per-son or the subject matter. If a court has expressly considered the jurisdictional issues, however, a party cannot rely on this ground as a basis for relief from judgment."

There are a few cases since the Founding, both in this Court and in the lower courts, where a judgment which was void for lack of subject matter or personal jurisdiction were denied due to the prejudice to others who had relied upon the judgments and the moving party waited too long to exercise his/her remedy and was aware of the basis for challenging it earlier, but had slept on his/her rights. (*See, e.g.*, *Voorhees et al. v Jackson, ex dem. The Bank of the United States*, 9 L. Ed. 490, 499 ("some sanctity should be given to judicial proceedings, some time limited beyond which they should not be questioned, some protection afforded to those who purchased at sales"); *United States v One Toshiba Color television, et al.*, 213 F.3d 147, 158 (3rd Cir. 2000) ("While there is no statute of limitations in equity, yet it generally in this respect follows the law, and will, in the absence of special extenuating circumstances regard the delay as inexcusable.")

This Court has confirmed that a "judgment is not

void ... simply because it is or may have been erroneous," also that "Rule 60(b)(4) is not a substitute for a timely appeal." (*United Student Aid Funds, Inc. v Espinosa*, 130 S. Ct. 1367, 1377 (2010) Most circuits agree.

However, this is not a factor in the instant case. The lower courts' weren't simply wrong, they ignored the mandate that if a judgment is void, "relief is not discretionary, it is mandatory." (*Sindar v Garden, et al.*, 284 Fed. Appx. at 593 (10th Cir. 2008); *Hospital Mortgage Group, Inc. v Parque Industrial Rio Canas, Inc.*, 653 F.2d 54, 57 (1st Cir. 1981) ("4 Moore's Federal Practice P 60.25(1) at 793 (void judgment is nullity) ...; 11 Wright and Miller, Federal Practice and Procedure § 2862 at 197 (once judgment determined to be void, court must grant relief under Rule 60(b)(4)"); *Hunter v Underwood*, 362 F.3d 468, 475 (8th Cir. 2004) ("relief under Rule 60(b) is an extraordinary remedy that lies within the discretion of the trial court,... but relief from a void judgment pursuant to Rule 60(b)(4) is not discretionary.")

The lower courts also violated the mandate that it isn't necessary "to establish a meritorious defense or equitable reason for relief," Commentary to Rule 60(b)(4) in U.S.C.S., by Birchall and Grout. (*See also Hunter v Edwards*, 226 F.2d 410, 413 (8th Cir. 1955) ("no showing of merits is necessary in support of a motion to vacate a void judgment"); FEDERAL PRACTICE AND PROCEDURE, § 2862 (2nd ed.) There is no discretion on the part of the court when a motion is under Rule 60(b)(4). Nor is there any

requirement ... that the moving party show that he has a meritorious defense.")

The district court judge said in his decision denying Petitioner Rule 60(b)(4) Motion that there wasn't any "indication that any of this 'new' evidence could not have been discovered within the 1-year time period with which to file his petition for writ of habeas corpus Furthermore, there is nothing in the record before the Court that suggests this 'new' evidence would likely result in a different outcome." (Appendix Page "B-5"—Order of Hon. Richard H. Battey, dated June 16, 2010)

It might appear that Judge Battey was referring to new evidence submitted with the Rule 60(b)(4) Motion. Petitioner submitted no *new evidence* with the Motion. The new evidence was submitted with his § 2255 Motion in early 2000 and never even mentioned by either Judge Battey or his magistrate. Petitioner well understands that a Rule 60(b) Motion which raises new evidence would be deemed a second or successive Motion, as this Court opined in *Gonzalez v Crosby*, 545 U.S. 524, 531 (2005) (*See also CROCS West, Inc. v Humphries*, 170 L. Ed. 2d 864, 886 (2008) dissenting opinion of Justice Thomas) ("Virtually every Court of Appeals to consider the question [of new issues in a Rule 60(b) Motion] has held that such a pleading is in substance a successive habeas petition.")

No, Petitioner cited 19 examples of "newly discovered evidence" which *could not have been*

discovered prior to trial, which were raised in his § 2255 Motion, and not one of which was even mentioned by the lower courts. Pursuant to 28 U.S.C. § 2255(f)(4) this started the 1-year limitation to filing. Petitioner set these out in his Rule 60(b)(4) Motion to demonstrate that he did not receive the protections of procedural due process required in habeas proceedings and which made the denial of his § 2255 not simply in error, but *VOID*.

Now, as to the issue before the Court regarding the conflict between the circuits as respects the time allowable for bringing a Motion under Rule 60(b)(4), Petitioner calls attention to what Judge Battey said in his Order denying the Rule 60(b)(4) Motion: "Furthermore, 'a Rule 60(b)(4) motion must be made within a reasonable time.' *Baldwin*, 516 F.3d at 738. Petitioner has waited approximately nine years before presenting this motion to the Court and not within a 'reasonable time.'" (Appendix Page "B-6")

Petitioner did not sleep on his rights, so this cannot be made a basis for denying the Rule 60(b)(4) Motion. Judge Battey admits that after he denied Petitioner's § 2255 Motion, Petitioner filed (on December 28, 2000) "a motion to amend or correct the judgment." (Rule 59(e)) (Appendix Page "B-2) Judge Battey admits that Petitioner "also filed a notice of appeal and motion for certificate of appealability on December 29, 2000." (*id.*) Petitioner also filed an Application for a COA to the Eighth Circuit, which they also denied. Petitioner then filed a Petition to this Court for a COA. (Case No. 00-

10471) Since Judge Battey did not consider Petitioner's new evidence on the merits in his § 2255, Petitioner filed a numerically second § 2255 raising only the evidence he finally obtained with due diligence after May 2000, in conformity with *Crouch v Norris*, an 8th Circuit case in 251 F.3d 720 (8th Cir. 2002), and this Court's decision in *Stewart v Martinez-Villareal*, 523 U.S. 673 (1998), but that Motion was denied as well. He filed for a COA on that denial to the 8th Circuit, but they deemed it as a second or successive Motion and denied it. He filed a Rule 60(b)(6) Motion with the district court after this Court decided *Gonzalez v Crosby*, not raising any new evidence or claims, but Judge Battey denied that as well. The 8th Circuit denied a COA as well. This Court also denied certiorari on that COA. Unquestionably, Petitioner has used every remedy available to him to fight the denial of procedural due process respecting the denial of his § 2255 in late 2000.

Whether correct or incorrect, Petitioner did not raise the void judgment in his July 2006 Rule 60(b)(6) Motion. His understanding of the law, as explained in *Liljeberg v Health Svcs.*, 486 U.S. 847, 863 (1988) was that Rule 60(b)(6) could not raise any ground available under subsections (l) through (5) of Rule 60(b). However, he did set forth the reasons why the lower court's conclusion that his motion was untimely filed was error consistent with *Gonzales v Crosby*.

Petitioner asserts that the lower court's decisions respecting his Rule 60(b)(4) Motion were counter to

the Rule's purposes and this Court's and most of the lower courts' caselaw on point. It is irrelevant whether the underlying motion (§ 2255 in Case No. 00-cv-4055 (D.S.D. 2000)) had merit. It was incorrect to conclude that the Motion was not brought within a reasonable time. Petitioner respectfully asks this Court to resolve the conflict among the circuits as to the time within which to bring a Rule 60(b)(4) motion to void a judgment. However, Petitioner's § 2255 did have substantial merit.

B. It is unclear what is included in the expression "acted in a manner inconsistent with due process," and there appears to be both uncertainty and a difference of opinion among the circuits as to how this justifies a finding that a judgment is void under Rule 60(b)(4), which this Court in its supervisory powers ought to resolve.

Many of the lower courts have stated that "A judgment is void if the rendering court lacked jurisdiction or acted in a manner inconsistent with due process." (*Kessler v Crichton*, 221 F.3d 1342-1343 (8th Cir. 2000))

The First Circuit appears to hold that this due process is limited to the service of process on defendants. (See, e.g., *Farm Credit Bank of Baltimore v Ferrera-Goitia, et al.*, 316 F.3d 62, 68 (1st Cir. 2003) ("Personal jurisdiction is obtained over a defendant by service of process"); *United States v LaFuenta-Rivera, et al.* 238 F.3d 76, 78 (1st Cir. 2001) ("A judgment is void ... only if that court's

action amounts to a plain usurpation of power" in respect to the defendant's rights in a forfeiture); *General Contracting & Trading Co., LLC v Interpole, Inc.*, 940 F.2d 20, 22 (1st Cir. 1991) (the court there applied the test of due process to proper notice under the long arm statute.) Petitioner has been unable to find any First Circuit case which applies due process in a Rule 60(b)(4) Motion other than in regard to failure to serve the parties.

The Third Circuit's position is also unclear as it appears to equate the basis for Rule 60(b)(4) Motion to void judgments under due process to failure to properly serve the parties.

This Court's recent case of *United Student Aid Funds, Inc. v Espinosa*, 176 L. Ed. 2d 158 (2010) applied the "'element of due process" in the Rule 60(b)(4) context as relating to the proper service of process. The Court noted that "[d]ue process requires notice 'reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Id.*, at 170-171) But, the Court did not further identify the contours of due process rights which would make a judgment void or valid.

In *Murray's Lessee v Hoboken Land Improvement & Management Co.*, 59 U.S. (18 How.) 272, 276 (1856), this Court said that '[t]he words 'due process of law, were undoubtedly intended to convey the same meaning as the words 'by the law of the

land,' in Magna Charta."

In *United States v Strada*, 503 F.2d 1081, 1085 (8th Cir. 1974) that court said that "[b]ecause due process is a flexible concept, each particular situation must be examined in order to determine what procedures are constitutionally required."

In *Gonzalez v Crosby*, 545 U.S. 524, 534 (2005), this Court said that "Rule 60(b) has an unquestionably valid role to play in habeas cases... The Rule also preserves parties' opportunity to obtain vacatur of a judgment that is void."

Since Rule 60(b)(4) is an appropriate remedy in habeas cases, and since due process is "undoubtedly intended to convey the same meaning as the words "by the law of the land," (*Murray's Lessee*, 59 U.S. at 276), and "each particular situation must be examined in order to determine what procedures are ... required," (*Strada*, 503 F.2d at 1085), then it would appear that if the procedures involved with a habeas case proceeding do not comport with what the law of the land requires — not remotely in the instant case—then a § 2255 judgment is void if "the rendering court ... acted in a manner inconsistent with due process." (*Kessler*, 221 F.3d at 1343)

This comes close to this Court's decision in *Klapprott v United States*, 335 U.S. 601, 609 (1949): "The judgment is void if the hearing of evidence is a legal requirement to rendition of a valid default judgment."

The "hearing of evidence" is required in a § 2255 proceeding if "the motion and the files and records of the case [do not] show that the prisoner is entitled to no relief." (28 U.S.C. § 2255(b)) Judge Lawrence L. Piersol determined that these considerations left him with no choice but to "cause notice thereof to be served upon the United States attorney." (*Id.*) From this point, the court was required by law—the codified version of habeas corpus for Federal prisoners—to "determine the issues and make findings of fact and conclusions of law with respect thereto." (*Id.*)

In subsection (f)(4), § 2255 states that the "1-year period of limitation" set in (f) runs from "(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Certainly this part of the "law of the land." Due process would have to include obedience to the dictates of § 2255 and the Rules Governing Section 2255 Proceedings.

Petitioner avers that it is axiomatic that in order for a judgment to be valid, it must be based on the pleadings in the correct case. Stated otherwise, by way of example, if a prisoner was convicted in one case in Federal court with perjury in violation of 18 U.S.C. § 1651, and he filed a § 2255 collaterally challenging that conviction, to which the Government responded, the judge or magistrate considering his § 2255 in a later case in which the prisoner was convicted of tax evasion, could not ignore the motion in the later § 2255 and make his

decision exclusively on the Government's Response to the § 2255 in the perjury case.

This would be a violation of the Due Process Clause for the reason that the court did not "determine the issues and make findings of fact and conclusions of law *with respect thereto*." (28 U.S.C. § 2255(b) (emphasis added.) That's what the "law of the land" required. (*Murray's v Lessee*, 59 U.S. at 276)

In the instant case, Petitioner was arrested on charges of operating a Ponzi scheme in Case No. 96-cr-40048 in June 1996. He pled not guilty because he was not guilty, not remotely. When Petitioner refused to lie and say he was guilty and refused to lie in testimony against three men he knew were 100% innocent, and another man whom he believed was innocent, the Government superseded the indictment and added more charges and three more defendants. Then they filed a second indictment alleging tax evasion for failure to pay all of the withholding tax due on Petitioner's business. He was tried on the tax charges first (Case No. 96-cr-40122), both cases in the District of South Dakota.

Petitioner retained counsel and asked him to move for suppression of the evidence because the magistrate who issued the warrant was not neutral and detached and had no business using his position to accomplish a private agenda he had been unable to accomplish legally for five years prior. Counsel did file a bare bones motion for suppression, but

instead of investigating the facts pertaining to the magistrate, as he said he had done, he never talked to anyone associated with that magistrate. The fact of his failure to investigate was not learned by Petitioner until December 15, 1999, when a law partner in the firm the magistrate had a part-time practice in said that the magistrate absolutely knew who Petitioner was when he issued the warrant and that all of the staff at the law office knew of his animosity toward Petitioner and that this was what caused him to issue the warrant, disregarding whether there was probable cause to do so. This "fact[] supporting the claim ... presented [which] could [not] have been discovered through the exercise of due diligence" prior thereto (§ 2255(f)(4)) was set forth as new evidence in his § 2255 Motion attacking the conviction in the Ponzi case; he learned of it too late to raise it in his § 2255 in the tax case.

Now, given the fact that the law of the land required the magistrate to "determine the issues and make findings of fact and conclusions of law with respect thereto" (§ 2255(b)), Petitioner had a due process right to have the magistrate at least mention this new evidence. But, he didn't! Instead, he based his Findings and Recommendations on the Government's Response to the tax case in an entirely different proceeding with a different case number (99-cv-4208).

That such a perversion of justice could happen in a court of law, is bad enough; however, that one

example of "facts supporting the claim or claims presented" (§ 2255(f)(4)) is not the only one which was not "determine[d]," upon which there was no "conclusion[] of law" and no finding of fact. Petitioner had raised at least 18 other distinct groups of new evidence which he had tried to get from the Government since prior to trial and finally got only 2½ years after trial while his § 2255 motion was being prepared. The magistrate did not even mention a single one. The reason: He wasn't looking at the § 2255 Motion Petitioner filed in the case he was assigned to make his Findings and Recommendations on; and not even on the Government's Response to the correct Motion—it was based entirely on the Government s Response to the Motion challenging the conviction in the tax case!

More than 100 people, family, friends, acquaintances, strangers, lawyers, etc., have examined the actions of the district court and the Eighth Circuit and have expressed complete shock that such a violation of Petitioner's due process rights could occur and stand in any court of law. (See Appendix Page "F-1" hereto.)

Another issue Petitioner presented in his § 2255 in the Ponzi case was the failure of Judge Piersol, the sentencing and trial judge—not the judge who denied the § 2255—to advise Petitioner of his right to proceed in forma pauperis on appeal with appointment. The three co-defendants with Petitioner all had appointed attorneys; Petitioner

was pro se because his retained attorney provided such woefully incompetent assistance at the tax trial that Petitioner fired him and the magistrate would not allow time to bring another attorney up to speed for the Ponzi case. Judge Piersol told each of the three co-defendants that their appointed attorneys would continue to represent them on appeal if they chose to appeal, which they all did, but when he pronounced a sentence of 246 months on Petitioner for allegedly operating a Ponzi scheme which was said to have resulted in losses of $1.3 million to him and his partners, all he said was that he had the right to appeal. Petitioner believed in light of this that he had no right to appointment of counsel since he had waived it for trial and sentencing; after all, those co-defendants who had not waived appointment of counsel were informed that their attorneys would continue to represent them, but said nothing about that to Petitioner.

The denial of counsel at any stage of a criminal proceeding is presumptively prejudicial. As this Court confirmed in *Roe v Flores-Ortega*, 528 U.S. 470, 483 (2000), "[t]he presumption that counsel's assistane is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage," (quoting *United States v Cronic*, 466 U.S. 648, 659). "The same is true on appeal ....Under such circumstances, 'no showing of prejudice is required,' because 'the adversary process itself is presumptively unreliable.' *Cronic, supra*, at 659."

Petitioner did not raise this issue as a ground for

the Rule 60(b)(4) Motion. He only cites this to demonstrate why he was able to raise issues which normally would have been raised on direct appeal in his § 2255. The proper remedy for such a violation of a Sixth Amendment right is to resentence to start the appeal process anew.

When the magistrate made his Findings and Recommendations on Petitioner's § 2255 Motion in Case No. 00-cv-4055, he only addressed two things: (1) The Government's Response to an unauthorized Second Addendum filed months after the initial filing, raising an *Apprendi* issue, which was separately responded to by AUSA Zuercher; and (2) the issues AUSA Kohn responded to in Case No. 99-cv-4208—the tax case. Petitioner's issues in the tax case § 2255 involved ineffective assistance of *trial counsel*. However, *Petitioner was pro se during trial in the Ponzi case!* (See Appendix Pages "D-1" through "D-11" hereto.)

But the issues involving new evidence which extended the 1-year limitation to filing pursuant to § 2255(f)(4) were not even mentioned! Examples are set forth in Appendix Pages "E-1" through "E-5" hereto. Note: Magistrate Young admitted that the "statute of limitations" could be extended under "number four, the date on which the facts of the supporting claim [sic] could have been discovered through the exercise of due diligence." (Appendix Page "D-9" hereto.) However, instead of reciting the 19 or more *actual* examples of newly discovered facts which Petitioner had in his Motion, Magistrate

Young recited the examples of ineffective assistance AUSA Kohn Responded to in Case No. 99-cv-4208. (See Appendix Pages "D-1" through "D-11" hereto.)

Due to this mix-up on the part of Magistrate Young, Petitioner was deprived of his rights under the Due Process Clause of the Fifth Amendment, that is if this Court's statement is *Klapprott v United States*, 335 U.S. 601, 609 (1949) is understood correctly. If "the hearing of evidence is a legal requirement," as it surely is under § 2255, then the failure to even determine the right issues, the failure to make findings of fact and conclusions of law, and the obvious reliance upon *the wrong pleadings*, makes Petitioner's judgment in 00-cv-4055 "void!"

Petitioner also had the right to object to the Findings and Recommendations of Magistrate Young pursuant to 28 U.S.C. § 636(b)-(l)(C), and his rights involved having the "judge of the court ... make a de novo review of those portions of the report or specified findings or recommendations to which [Petitioner] object[ed]." Judge Battey *presumed* that his magistrate had made his recommendation on the case before him, so he adopted the magistrate's recommendation that the motion was time barred without a de novo review.

If he had not *presumed*, he would have noted that Petitioner said in his Objections at 19 that "the foregoing relate to the matter that was before this Court in 99-4208 (Crim. Case No. 96-40122). ...

[T]his Court cannot possibly adopt such an erroneous conclusion." But, Judge Battey never noticed that the Findings were on the wrong pleadings, never knew that his magistrate wasn't aware of the dozen and a half plus examples of *actual* new evidence—which he himself said would have extended the time limitation—so he "acted in a manner inconsistent with due process" (*Kessler*, 221 F.3d 1342-1343 (8th Cir. 2000)), at least as Petitioner understands his rights under "the law of the land." (*Murray's Lessee*, 59 U.S. at 276 (1856))

There can hardly be a more prime example of what constitutes a void judgment than one based upon the wrong pleadings! This becomes all the more egregious in light of the fact that Petitioner received a 246-month sentence for allegedly operating a Ponzi scheme which cost his "victims" $1.3 million, a fraud offense typically punished by 24 to 30 months in prison. Petitioner is now in his 74th year of life and he has already served more than 169 months (plus received credit for more than 24 additional months for good conduct). He has four more years to serve, if he lives that long. But, if "the court had not acted in a manner inconsistent with due process," as many courts have worded the second basis for granting a void judgment, he would in all probability have been released more than ten years ago.

Due to the lack of specific direction as to what the contours of "due process" are in respect to finding a judgment void, and the apparent difference of opinion in some circuits that it relates only to service

of process, it is incumbent upon this Court to exercise its supervisory powers and clarify this matter.

CONCLUSION

Pursuant to Supreme Court Rule 10(a), this Honorable Court ought to exercise its supervisory powers for the reason that the Eighth Circuit has decided Petitioner's appeal in a manner in conflict with the opinion of other circuits and has "so far departed from the accepted and usual course of judicial proceedings...[and] sanctioned such a departure by a lower court" as to justify the Court's action.

The district court denied Petitioner's Rule 60(b)(4) Motion on two impermissible grounds: (1) That there was no merit to the underlying motion upon which the judgment challenged was based; and (2) that the Motion was not brought within a "reasonable time." The Eighth Circuit's caselaw validating that conclusion was cited by the district judge. All circuits appear to agree that it is irrelevant in Rule 60(b)(4) Motions whether the underlying motion denied had merit. A majority of circuits agree that a Rule 60(b)(4) Motion may be brought at any time. Several circuits, including Petitioner's home circuit, say otherwise. There appear no parameters in case law to define what is meant by the expression when a court "acted in a manner inconsistent with due process." Some circuits appear to limit this to service of process;

however, this Court expressed the opinion more than sixty years ago that "if the hearing of evidence is a legal requirement," and the lower court failed to do this, the judgment is void. (*Klapprott*, 335 U.S. at 309 (1949)) That Court also stated that Rule 60(b) has authority "adequate to enable them to vacate judgments *whenever* such action is *appropriate to accomplish justice*." (*Id*, at 614-615.)

WHEREFORE, Petitioner respectfully prays the Court will grant the Petition for a Writ of Certiorari and remand this matter to the lower court with instructions to examine the facts set forth in his Rule 60(b)(4) Motion without reference to the underlying merit of the § 2255 Motion and without reference to the passage of time, and for such other relief as to the Court appears just and equitable.

By executing this Petition this 31st day of January, 2011, Petitioner declares that the statements herein are true on penalty of perjury pursuant to 28 U.S.C. § 1746.

/S/ Eugene H. Mathison
Petitioner, pro se

No: 10-2765

Eugene H. Mathison

Petitioner - Appellant v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of South Dakota - Sioux Falls (4:00-cv-04055-RHB)

JUDGMENT

This court has reviewed the original file of the United States District Court. It is ordered by the court that the district court's denial of appellant's Rule 60(b)(4) motion is summarily affirmed. See Eighth Circuit Rule 47A(a). The motion for leave to proceed in forma pauperis is denied as moot.

November 30, 2010

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/S/ Michael E. Gans

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

EUGENE H. MATHISON, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	CIV. 00-4055 CR. 96-40048 ORDER

BACKGROUND

Petitioner was convicted of mail fraud, wire fraud, money laundering, and conspiracy on May 20, 1997, after a jury trial. He was sentenced to serve 246 months incarceration on September 12, 1997. His appeals were exhausted when the United States Supreme Court denied his motion for writ of certiorari on January 11, 1999.

On April 3, 2000, petitioner filed a motion for writ of habeas corpus. The matter was referred to the

magistrate judge. After reviewing the matter, the magistrate judge found that petitioner's application for writ of habeas corpus was barred by the statute of limitations as it was filed more than one year after his conviction became final. The magistrate judge further determined that petitioner did not meet any of the exceptions to the statute setting forth the statute of limitations and therefore, his claims were barred.

On December 19, 2000, this Court adopted the findings and recommendation of the magistrate judge and denied the petition for writ of habeas corpus. On December 28, 2000, petitioner filed a motion to amend or correct the judgment. In that motion, petitioner contended that the magistrate judge had erroneously considered his claims from another habeas petition arising out of a different criminal case. Petitioner also contended that there was new evidence exonerating him and that the government had impeded his attempts to discover said evidence earlier.

Petitioner also filed a notice of appeal and motion for certificate of appealability on December 29, 2000.

In these pleadings, petitioner contested the conclusion of the Court that his claims were time-barred. Petitioner also set forth his claims regarding new evidence and other grounds for relief. The Court denied the motion for certificate of appealability on January 4, 2001. On January 9, 2001, the Court also denied petitioner's motion to amend the judgment.

On April 5, 2001, Petitioner filed an amended notice of appeal which more fully stated the grounds upon which he believed he was entitled to relief. Again, petitioner contended that his claims were not time-barred. Petitioner further argued that the government prevented him from filing the motion earlier. Petitioner also asserted that the magistrate judge had erroneously considered his claims from a different habeas matter involving a separate criminal offense. Petitioner vigorously asserted that he was in possession of new evidence which exempted him from the one-year statute of limitations.

On June 6, 2001, the Eighth Circuit Court of Appeals issued its mandate affirming the determination of the district court.

Currently pending before the Court is petitioner's motion pursuant to Fed. R. Civ. P. 60(b)(4). Petitioner contends that the judgment in the above entitled matter is void because it was rendered "in a manner inconsistent with due process." Docket #68, p. 1. In this motion, petitioner claims that the magistrate judge failed to properly consider the claims he raised in his petition for writ of habeas corpus and, in fact, erroneously considered claims set forth in a separate proceeding. Petitioner also sets forth the claims that were previously set forth in his petition for writ of habeas corpus, his motion to amend the judgment, the notice of appeal, and the amended notice of appeal.

DISCUSSION

Federal Rule of Civil Procedure 60(b) sets forth the grounds for relief from a final judgment, order, or proceeding. It states in pertinent part as follows:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (4) the judgment is void[.]

Fed. R. Civ. P. 60(b)(4). "'A judgment is void if the

rendering court lacked jurisdiction or acted in a manner inconsistent with due process.'" *Baldwin v. Credit Based Asset Servicing and Sercuritization*, 516 F.3d 734, 737 (8th Cir. 2008) (quoting *Kessler v. Crichton*, 221 F.3d 1342, 1342 (8th Cir. 2000)).

There is no question or contention that this Court had jurisdiction when the final order was entered, rather petitioner contends that the order was entered in a manner inconsistent with due process. Here, petitioner had both notice and an opportunity to be heard before the final order was entered. His claims were presented in both his petition, his motion for reconsideration, his notice of appeal, and his amended notice of appeal. Both this Court and the Eighth Circuit examined his pleadings and determined that his claims were barred by the statute of limitations. The potential "new" evidence which he sets forth in his current motion consists mainly of documents which he had access to at the time of the trial. There is no indication that any of this "new" evidence could not have been discovered within the 1-year time period with which to file his petition for writ of habeas corpus. Furthermore,

there is nothing in the record before the Court that suggests this "new" evidence would likely result in a different outcome.

The Court finds that this motion is an attempt to adjudicate the same issues that have previously been presented to this Court and to the Eighth Circuit. The law is clear that motions pursuant to Fed. R. Civ. P. 60(b) may not be used to avoid a timely appeal. *See Hunter v. Underwood*, 362 F.3d 468, 475 (8th Cir. 2004). Furthermore, "[a] Rule 60(b)(4) motion must be made within a reasonable time ...." *Baldwin*, 516 F.3d at 738. Petitioner has waited approximately nine years before presenting this motion to the district court. Petitioner then filed a motion under Fed. R. Civ. P. 60 requesting relief from judgment. On June 16, 2010, this Court denied that motion finding that it sought to present issues which had previously been adjudicated. Mathison requests the Court to reconsider the Court's Order and to allow him to proceed *in forma pauperis* on appeal.

The Court, upon reviewing Mathison's motion for reconsideration, finds that the motion lacks merit.

The Court will not reverse its determination set forth in the Order dated June 16, 2010, is not taken in good faith. As a result, the Court shall also deny this motion. *See* 28 U.S.C. 1915(a)(3). Accordingly, it is hereby

ORDERED that petitioner's motion for reconsideration (Docket #71) is denied.

IT IS FURTHER ORDERED that petitioner's motion to proceed *in forma pauperis* on appeal (Docket # 73) is denied.

Dated this 31st day of June, 2010.

BY THE COURT

/S/ RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

EUGENE H. MATHISON, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	CIV. 00-4055 CR. 96-40048 ORDER

Currently pending before the Court is Eugene Mathison's motion for reconsideration of the Court's Order dated June 16, 2010, and his motion to proceed *in forma pauperis* on appeal of this same Order. Mathison was convicted of mail fraud, wire fraud, money laundering, and conspiracy on May 20, 1997, after a jury trial. He was sentenced to serve 246 months incarceration on September 12, 1997. His appeals were exhausted when the United States Supreme Court denied his motion for writ of

certiorari on January 11,1999.

On April 3, 2000, Mathison filed a motion for writ of habeas corpus. On December 19, 2000, this Court adopted the findings and recommendation of the magistrate judge and denied the petition for writ of habeas corpus. On June 6, 2001, the Eighth Circuit Court of Appeals issued its mandate affirming the determination of the district court. Petitioner then filed a motion under Fed. r. Civ. P. 60 requesting relief from judgment. On June 16, 2010, this Court denied that motion finding that it sought to present issues which had previously been adjudicated. Mathison requests the Court to reconsider the Court's Order and to allow him to proceed *in forma pauperis* on appeal.

The Court, upon reviewing Mathison's motion for reconsideration, finds that the motion lacks merit. The Court will not reverse its determination set forth in the Order dated June 16, 2010. Furthermore, the Court finds that the appeal of the Order dated June 16, 2010, is not taken in good faith. As a result, the Court shall also deny this motion. See 28 U.S.C 1915(a)(3). Accordingly, it is

hereby

ORDERED that petitioner's motion for reconsideration (Docket #71) is denied.

IT IS FURTHER ORDERED that petitioner's motion to proceed *in forma pauperis* on appeal (Docket #73) is denied.

Dated this, 31st day of July, 2010.

BY THE COURT:

/S/ Richard H. Battey
UNITED STATES DISTRICT JUDGE "

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

EUGENE H. MATHISON, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	CIV. 00-4055 CR. 96-40048 FINDINGS AND RECOMMENDATIONS REGARDING DEFENDANT'S § 2255 PETITION

Petitioner, Eugene H. Mathison, pro se, filed a motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 on April 3, 2000. The petition was dated and executed on March 31, 2000. On April 19, 2000, the petitioner filed an amended § 2255 petition, and on July 19, 2000, a supplement. On August 23, 2000, petitioner filed a second addendum to his § 2255 motion. The government filed their answers and responses.

Statute of Limitations. The government contends

in their answer and response that the defendant's motion is barred by the statute of limitations. The record shows the defendant's judgment and conviction occurred after a trial on May 20, 1997, wherein he was found guilty of numerous counts of mail fraud, wire fraud, money laundering, and conspiracy. He was sentenced on September 12, 1997, to 246 months. He appealed to the Eighth Circuit which affirmed the conviction in State v. Mathison, 157 F.3d 541. He filed a petition for rehearing which was denied, and a petition for certiorari to the United States Supreme Court which was denied on January 11, 1999. Petitioner filed a motion for rehearing before the United States Supreme Court which was denied on April 3, 2000. Petitioner claims that the filing of the motion for rehearing extended the period of time for the filing of his § 2255 motion. Rule 16 of the Supreme Court Rules states,

> 3. Whenever the court denies a petition for writ of certiorari, the clerk will prepare, sign, and enter an order to that effect, and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial

will not be suspended pending the disposition of a petition of rehearing, except by order of the court or a Justice.

There is a one year statute of limitations in 28 U.S.C. § 2255 which requires that a petition be filed within one year of the latest of:

1. the date on which the judgment of conviction becomes final;
2. the date on which the impediment to making a motion created by government action in violation of the constitution is removed;
3. the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court, and made retroactively applicable to cases on collateral review; or
4. the date on which the facts of the supporting claim or claims presented could have been discovered through the exercise of due diligence.

Under number one, the date on which the judgment of conviction becomes final, case law indicates that is the date the writ of certiorari was denied or the date that the time for filing said writ

has expired. Petitioner contends that the right to file a petition is extended due to filing of his motion for rehearing, which argument is contrary to Supreme Court Rule 16, and no case authority is cited for his position. Therefore, because the conviction became final on January 11, 1999, and the petitioner's motion, pursuant to 28 U.S.C. § 2255 was executed and dated on March 31, 2000, more than one year has expired under this provision.

Issue number two does not apply to this particular case in that the government action did not impede the filing of this motion.

Issue number three depends on whether the case of *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) is a newly recognized right by the Supreme Court, and is made applicable to this case on collateral review. *Apprendi* held that as a matter of constitutional law, "other than the fact of a prior conviction, any fact that increases a penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

The petitioner alleges that he received an additional sentence for matters which were not

presented to the jury, including: 1) violation of the terms of his PR bond; 2) being a manager or supervisor of an alleged scheme that involved more than five persons; and 3) the alleged scheme involved more than minimal planning. He states that he received an additional thirteen year sentence based upon these factors. The government contends that the sentence imposed was within the statutory maximum for the offenses charged in the Indictment, and for which the petitioner was found guilty. The government further states that defendant was convicted of seven counts of money laundering in violation of 18 U.S.C. § 1956. Each count carries a maximum sentence of twenty years or a total of one hundred and forty years. Therefore, he was not sentenced to a term of more than that authorized by the jury's verdict.

The first consideration is whether *Apprendi* applies to cases on collateral review. In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court held that new rules of constitutional law did not apply on a collateral attack. Later, the Supreme Court in *O'Dell v. Netherlands*, 521 U.S. 151 (1997), set forth

a procedure to be followed when a Teague issue has been raised on a collateral attack. First, the court must determine whether the defendant's conviction became final prior to the decision he now invokes. In this case, petitioner's conviction did become final prior to the *Apprendi* decision. The second step is invoked to determine whether the decision adopts a new rule. In this case, it is obvious that *Apprendi* adopted a new rule, and therefore, you must turn to the third step to determine whether an exception applies. The two exceptions are: 1) rules that place certain 'kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; and 2) rules that implicate fundamental fairness in a way that seriously affects the likelihood of an accurate conviction. *Apprendi* did not place any primary, , private individual conduct beyond the power of the law to proscribe. Further, *Apprendi* describes the protection and safeguards as procedural. *Apprendi* did not hold that a person may be punished for certain conduct, but rather, held that he may not be punished in the absence of procedural safeguards. The second excep-

tion involves fundamental fairness in a way that seriously affects the likelihood of an accurate result. In this case, the enhancement for a violation of his pretrial release conditions is not an issue that would be presented to a fact finder, but is more analogous to a prior offense. The second enhancement involved being a manager or supervisor of an alleged scheme that involved more than five persons. The defendant was convicted of conspiracy along with four other defendants. In addition, the defendant was convicted of mail fraud, wire fraud, money laundering, in multiple counts. This involves a complicated set of circumstances, and more than minimal planning. Therefore, the jury made a determination concerning this issue, and there was a reliable fact finding process at the trial. *See Solem v. Stumes*, 465 U.S. 638. There were safeguards available to protect the integrity of the truth determining process under Johnson v. New Jersey, 384 U.S. at 729. It is my finding and recommendation that the rule in *Apprendi* is not to be applied retroactively in this case involving a collateral attack.

However, if *Apprendi* is applied retroactively, it is

also my finding and recommendation that it does not apply in this case because the maximum sentence was more than a hundred and forty years, and he received a sentence of two hundred and forty-six months. The Eighth Circuit visited this issue in *United States v. Aguayo-Delgado*, 220 F.3d 926. In this case, the sentence was enhanced due to a drag quantity which was not presented to the jury. Defendant faced a statutory range of twenty years to life with the drug quantity of more than fifty grams of methamphetamine, and a sentence of not more than thirty years without reference to drug quantity. The defendant received a sentence of two hundred and forty months which was well within the statutory range without reference to drug quantities. *Apprendi* held that when a statutory "sentencing factor" increases the maximum sentence beyond the sentencing range otherwise allowed given the jury's verdict, then the sentencing factor has become "tail which wags the dog of the substantive offense," *Apprendi*, 120 S. Ct. 2348. *Apprendi* concluded that if the government wishes to seek penalties in excess of those applicable by virtue of the elements of the

offense alone, it must prove those beyond a reasonable doubt. Aguavo-Delgado argued that because the drug quantity affected his sentence, and enhanced the penalty under the sentencing guidelines, he is entitled to relief. This argument was rejected by the Eighth Circuit wherein they held that *Apprendi* applies only where the non-jury factual determinations increase the maximum sentence beyond the statutory range authorized by the jury's verdict.

The Eighth Circuit in *United States v. Chavez*, 200 Westlaw 1556050, held in accordance with Aguavo-Delgado that unless the sentence exceeds the maximum provided by law, *Apprendi* does not apply.

The final issue is whether the statute of limitations is extended under number four, the date on which the facts of the supporting claim could have been discovered through the exercise of due diligence. Petitioner's first allegation is that he received ineffective assistance of counsel because his attorney failed to investigate, file motions, and complete research, and because he was denied a

Franks hearing. These issues were raised on direct appeal, and do not relate to any newly discovered materials. Next, petitioner claims counsel was ineffective for not subpoenaing witnesses, which witnesses ultimately were subpoenaed and did testify at trial.. This is not an issue involving newly discovered matters. He alleges that certain questions he wanted his counsel to ask certain witnesses, and that counsel was incompetent for the cross-examination of two government witnesses. Neither of these allegations allege any new matter. Petitioner next alleges that the introduction of his own resume was improper, which once again is not a new allegation, and was raised in his appeal. Mathison also alleges that his attorney abandoned him, wherein the court records show that Mathison fired his attorney. Finally, he alleges that there were matters he could testify to that would result in his acquittal. However, he declined to testify, and certainly these facts are not new. Therefore, other than the *Apprendi* argument, there was nothing new that has been raised which would require an extension of the statute of limitations. Therefore, it

is my finding and recommendation that the statute of limitations has expired, and the petitioner is entitled to no relief.

Dated this 16th day of November, 2000.

BY THE COURT

/S/ Marshall P. Young
UNITED STATES MAGISTRATE JUDGE

The following list was provided as an exhibit to Petitioner's Rule 60(b)(4) Motion in this case. There are 18 examples of new evidence (not all cited in the § 2255 are listed); not one of these was "determined" and no "finding of facts and conclusions of law" were made — they were simply unknown because the magistrate had the wrong pleadings before him when he made his Findings and Recommendations.

1. An affidavit from Ben Kenitz, a Government witness who recanted his testimony and called for a new trial when he learned he'd been lied to by agents/prosecutors. (Exhibit "C" hereto)

2. A Declaration Under Oath from Marion Shermer, who said that her testimony was influenced by falsehoods given her by "the government," and who said that if she were to testify in a new trial her testimony "would have been substantiall different." (Exhibit "D" hereto)

3. Sworn Declaration of Charlotte Holmes confirming that I.R.S. S.A. Robertson perjured himself at trial in his testimony which he used to support the conspiracy charge. (Exhibit "E" hereto)

4. Sworn Statement of James Flannery who confirmed the same perjury of Mr. Robertson as Charlotte Holmes (above) did. (Exhibit "F" hereto)

5. Numerous Affidavits/Declarations affirming that the average person on the street had se

rious doubts as to Judge Piersol's lack of bias. (Note: Petitioner has since decided that although Judge Piersol's appearance of bias should have prompted him to recuse himself, he has since become convinced that Judge Piersol is not only unbiased, but one of the best judges in the nation.)

6. In Box 41 of Government's evidence, statements from a trust in Belize proving that AUSA Zuercher's claim that Petitioner had secreted as much as a half million dollars there was patently false as the evidence in his possession and denied him before trial proved that he only had about $600 there and all of it was deposited prior to the formation of the partnerships alleged to be used to defraud his partners. (Pages 54-55 of Traverse.)

7. Numerous documents from Bank of New York, Hughes Hubbard Reed—one of the largest law firms specializing in securities in the nation —Coopers & Lybrand, and other top firms, showing that Petitioner did reasonable due dilligence before investing his and his partners' money with Ronald Totaro. (Page 56 of Traverse)

8. FBI Bates pages 20583-20608, showing securities specialists Hughes Hubbard Reed's prospectus on the validity of Totaro's offering. (Traverse at page 57)

9. FBI Bates pages 63331-63333, showing that Hughes Hubbard wrote Goldman Sachs confirming that a closing on Totaro's offering had

been rescheduled to January. (Traverse at page 57)

10. FBI Bates pages 59019-59026. These pages are copies of a letter from Smith Barney in which they stated that "It is the intention of [Smith Barney] to commence the Transaction by March, 1995." This letter confirmed what Petitioner had heard one of Smith Barney's vice presidents promise Totaro when he was with him at a meeting at Smith Barney's headquarters in New York; it was another proof of the validity of Totaro's veracity when claiming that he was near to closing his transaction for which he borrowed more than a million dollars from Petitioner and his partners., (Traverse at 57)

11. Box No 83 of Government's evidence, there were copies of faxes and material to and from Bill Redman, an attorney with Hughes, Hubbard, and Petitioner showing that he had direct communication with the firm which was handling the private placement offering of Totaro. (Page 57 of Traverse)

12. FBI Bates page 57700. Confirmation of a letter or fax in which there was confirmation that Totaro had received a rating from Moody's of "A" to cover the costs of that rating. (Traverse at 58)

13. FBI Bates pages 62180-62187. Copy of several letters and faxes from hughes, Hubbard to Moody's offering further evidence of Moody's rating of Totaro's bond. (Traverse at 58)

14. FBI Bates pages 45021-45027. Copies of letters between Stewart Baliss, president of Aetna International in London, and Jean Waggett, another officer thereof, confirming a $300,000,000 commitment to Totaro. (Traverse at 58-59)

15. FBI Bates page 44238. Confirming a commitment from M Bank of Texas for $100,000,000, which was cancelled, resulting in a suit by Totaro to recover damages. (Traverse at 59)

16. In Government's evidence box number 83, a copy of a letter from Anthony Moschitta, of Greyson Financial in New York, providing a guarantee to Petitioner for up to $100,000 in loans to Totaro. (Traverse at 59-60)

17. FBI Bates pages 77180-77197. Copies of Totaro documents showing $2,667,000 was due from him to Petitioner and his partners for money lent to him. (Traverse at 60)

18. In Government's evidence box number 42, there was a copy of a two-page letter from Lowell O'Brien, one of Petitioner's partners in the failed investment group, who stated that he had changed his mind and wanted to delay his withdrawal of $10,000. The Government used his claim that he had asked for his money and never received it, to support their case; however, the FBI had seized a certified check to his family for the amount they did want and the jury was never allowed to see it or four or five others to partners who the Government called to testify to similar

requests for withdrawals which were never made. (Traverse at 61)

The Government's case was that Petitioner had set up his investment groups simply to funnel money to Ron Totaro. The above demonstrate that Petitioner did his due diligence and simply lent Totaro money from his partnership to earn a higher rate of interest than he and his partners were earning in other investments. Petitioner requested this evidence from his retained attorney, and when he failed to obtain it, he moved the court to order it provided. The Government resisted his request and the magistrate denied his request.

SWORN DECLARATION OF DERROD R. MATHISON

I, Derrod R. Mathison, the undersigned Declarant, do solemnly swear that the statements I am making below are true under penalty of perjury pursuant to 28 U.S.C. § 1746.

I am the 35-year-old son of Eugene H. Mathison, who is preparing a Petition for Certiorari in the Supreme Court of the United States. I believe that I have valuable information which will assist the Court in its determination.

When my father was jailed on charges that he operated a Ponzi scheme, everyone familiar with him knew that the charges were false. As a matter of principle, Dad would never intend to cheat anyone. This is not to say that he did all things in the best possible way: he was not even a high school graduate and he worked hard, but did not have the education needed to understand all of the requirements of law and business.

Where I particularly became involved was after Dad was sentenced to 246 months in prison for supposedly cheating his partners out of a little over one million three hundred thousand dollars; money for the most part he had invested in loans to obtain a higher rate of interest than available through conventional investments. Dad was not made aware that he had the right to appointment of counsel and to have costs paid due to his indigency.

My mother, with whom I and my younger siblings lived, were desperate for money at the time Dad said that he had to pay the filing fee for his appeal. My mother did not want to ask for public assistance, which she has not done through all the more than 14 years Dad has been in prison. Together, we robbed Peter to pay Paul, so to speak, and came up with the filing fee, but there was no way we could cover the thousands of dollars needed for the transcripts, so Dad had to do without them.

Dad wrote out the arguments he wanted to raise on appeal the best he could and sent them to me to type into the computer. I sent him drafts and he edited and sent them back to me. Finally I provided a completed brief, but the Eighth Circuit sent it back because it was over their approved length. Dad then edited out as much as he could and sent it to me and I redid it, keeping it within the page limit. Even then AUSA Zuercher objected that the type size and spacing were condensed and wanted the clerk to refuse it again; however, they declined to do so.

Due to the hardships we endured (Mom had never worked during the years us kids were growing up), we were evicted and had to come up with a different house with a week's notice. Due to the scare money we had, Mom had to keep the heat so low that my youngest sister, 13 at the time, had to curl up at the base of the refrigerator to try to keep warm from the exhaust from the condenser.

We were all devastated when the Eighth Circuit

denied Dad's appeal. After exhausting all of his appeal remedies, Dad began preparing his motion to challenge the conviction and sentence under § 2255. Almost immediately, Dad was taken out on a writ to face another trial with the guy who cheated Dad and his partners out of more than a million dollars. AUSA Zuercher wanted to give Dad another 20 years because he refused to cooperate with them in investigating and trying Ronald N. Totaro. Fortunately, when their own witnesses said that if they were victims, so was my dad, the Government dropped all the charges and he was sent back to prison.

But, the harm was already done. Dad was found to be time barred because he didn't get his motion in within the time allowed under § 2255. Yet, in this respect, I have first-hand knowledge that he had every excuse not to have it filed within one year of this Court's denial of his petition for certiorari after his direct appeal was denied.

Dad was first transferred to the South Dakota prison when he was taken from Sandstone in early December. Dad and I had been trying to put together the facts and law for the motion when he was taken out and he was refused all access to a law library or even his legal records and preliminary research and case law until less than a week before the end of the limitation of one year on filing. From that point until the end of June 2000, Dad was allowed as little as 45 minutes a week to no more than two hours to do his research and make copies of cases so he would

hand write his motion and memorandum of law and send to me to type it out. I'd send back portions and he'd edit them and send back with new portions. It was a virtually impossible job to even get it done by the time we finally filed it the end of March 2000. The deadline normally would have been January 11, 2000, but there was simply no way he could do it in that time.

When the magistrate finally made his findings and recommendations, Dad sent me a copy and I could hardly believe what I saw. I typed that motion. I know what it contained. I guarantee you that the magistrate never made a single response to anything which was in that motion! How he got mixed up, I don't know, but he appears to have used the Response of a different prosecutor to Dad's § 2255 in a different case to make his findings on the case at bar. Obviously, he didn't have Dad's motion, which I typed for him and filed with the court by hand delivering it to the Clerk, because not one single ground for Dad's motion was even mentioned.

The huge amount of new evidence we cited in the motion and the traverse overwhelmingly showed that Dad was innocent, that he never intended to defraud anyone. He had done his due diligence in investigating Ronald Totaro and his firm in New York, having traveled there several times and having met with parties involved with the bond closing Totaro was attempting to close, and for which Dad had lent money to cover the costs, and he was estatic that Totaro's lenders were committed to funding his

bond. No way did he simply set up his investment groups to funnel money to Totaro as the Government alleged.

I have read Dad's motions and appeal briefs throughout this terrible travesty of justice and I know that his claims are bonafide. I am the one who typed this Petition and printed it. I urge in the strongest terms that the Court grant his petition and allow Dad to be released after serving more than 14 years for a fraud case which, even if he had been guilty, ought not to have resulted in more than three years in prison.

I have executed this Declaration this 23rd day of December, 2010.

/S/Derrod R. Mathison
817 W 11th Street #2
Sioux Falls, SD 57104